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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

93-266

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	

COMMENTS OF THE APPELLANT PARTIES

Adams Telcom, Inc., Advanced Tel., Inc., Columbia Wireless Limited Partnership, East Ascension Telephone Company, Inc., Middle Georgia Personal Communications, Paramount Wireless Limited Partnership, Reserve Telephone Company, Inc., Reserve Telecommunications and Computer Corp., and Tri-Star Communications, Inc. (the "Appellant Parties" or "Parties"),[1] by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[2] respectfully submit the following Comments in response to the Notice of Proposed Rule Making ("NPRM") released herein on October 21, 1993 (FCC 93-477). The Commission's conclusions in this proceeding regarding the continued co-existence of pioneer's preferences and competitive bidding procedures will affect the ultimate rights of the Parties. The Parties, therefore, urge the Commission to promote the public interest by maintaining a system which provides meaningful incentives to innovators. In support

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[1]/ The Appellant Parties are petitioners in Case No. 93-1103, currently pending before the United States Court of Appeals for the District of Columbia. Therein, the Appellant Parties maintain that the Commission's dismissal of the individual Parties' applications for award of a pioneer's preference in the Personal Communications Service was unlawful.

[2]/ 47 C.F.R. §§ 1.415 and 1.419.

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thereof, the Parties show the following:

I. INTRODUCTION

The pioneer's preference regulations[3] were established to promote innovation in the development of new technologies and services and to promote advancements and improvements in existing services.[4] These rules were adopted in recognition of the fact that the Commission's discharge of its statutory licensing responsibilities may have the unintended result of inhibiting the development and rapid deployment of new technologies and the innovative application of existing technologies. Specifically, the Commission found that the expense, length and uncertainties inherent in the radio spectrum licensing process acted as deterrents to innovation.[5] To counteract these obstacles, the Commission created the "pioneer's preference" incentive -- the outright grant of a license to an otherwise-qualified innovator by declaring its applications immune from mutual exclusivity and the resulting obligation to consider grant of the application only on a comparative basis.

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[3]/ See 47 C.F.R. §§ 1.402, 1.403, 5.207.

[4]/ See generally Establishment of Procedures to Provide a Preference, Report and Order, 6 FCC Rcd 3488 (1991); recon. granted in part, Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992); further recon. denied, Memorandum Opinion and Order, 8 FCC Rcd 1659 (1993).

[5]/ NPRM at ¶ 6.

II. NO RULE CHANGES ARE REQUIRED OR APPROPRIATE

In initiating the instant proceeding, the Commission opines that the recent grant of authority to grant licenses through competitive bidding[6] "may have undermined the basis for our pioneer's preference rules."[7] While the Appellant Parties commend the Commission's prudence in reexamining the basis for existing rules in light of new developments, the Parties nonetheless submit that the introduction of competitive bidding as a method of license award does not affect or supplant the significant public interest benefits obtained by the pioneer's preference framework. Consequently, the Parties urge the Commission to maintain its existing rules and endeavor to apply them in a consistent manner.[8]

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[6]/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 387, enacted August 10, 1993, codified at 47 U.S.C. § 309(j).

[7]/ NPRM at ¶ 7 (footnote omitted).

[8]/ The Parties' pending appeal (see supra n. 1) is based upon fact that the Commission failed to follow its own rules when it dismissed the subject applications. In this vein, it is noteworthy that, in the event that it determines to retain its pioneer's preference rules, the Commission proposes to eliminate the very basis upon which the Parties claim a pioneer's preference -- innovative use of an existing technology to provide new and improved services -- and confine award of pioneer's preferences to the development of new technologies. The Parties oppose this proposed rule change, just as they oppose, on appeal, the Commission's attempt to ignore its original adoption. As the Commission recognized when it adopted its pioneer preference rules, the public benefits from improved and innovative application of existing technology, just as it benefits from the introduction of new technologies.

While a reasonably-constructed competitive bidding format[9] may affect the length of time between application filing and license award, an auction format will not alleviate the other impediments to innovation which the current licensing system inflicts -- cost and uncertainty. Indeed, Congress itself recognized that there is nothing in an auction methodology itself which encourages or promotes innovation -- it directs the Commission to ensure that the rules it adopts to implement competitive bidding promote "the development . . . of new technologies, products and services."[10] The Parties submit that no competitive bidding structure, standing alone, will accomplish the Commission's stated goals of providing a meaningful incentive because a system which awards licenses by auction does not affect positively either the risk or cost of research and experimentation in new technologies or services.

The Commission errs in suggesting that a bidding innovator "would primarily control whether it obtains the desired license."[11] There exists no "control" where an innovator, having already expended time and resources in developing a new technology or new application of technology is thereafter forced to enter any

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[9]/ The Commission is currently considering the specifics of a regulatory framework for the introduction of a competitive bidding system. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No, 93-253, Notice of Proposed Rule Making (FCC 93-455, released October 12, 1993).

[10]/ 47 U.S.C. § 309(j)(3)(A).

[11]/ NPRM at ¶ 7.

license-award competition, whether it be comparative hearing, random selection or competitive bidding. The Commission's suggestion ignores the public interest concerns reflected by the pioneer's preference rules - the encouragement of experimentation and development in the field of communications through the provision of an incentive program which enables the innovator to test its own internal assessment of value in the marketplace by providing service under an awarded license.

The absence of the pioneer's preference award would defeat this public policy. Innovative pioneers who would otherwise be willing to invest in the development and deployment of new technologies and service applications will be discouraged from doing so if the fruits of their efforts are left to be harvested by another party who brings a deeper financial pocket to a spectrum auction. It is encouragement to innovation which lies at the heart of the pioneer's preference framework and which serves the public interest. Elimination of the incentive, i.e., assurance that creativity will be rewarded on its own merit without additional cost or risk, will thwart the Commission's established objectives.[12]

This is particularly true in the case of small entrepreneurs

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[12]/ The Parties note that the Commission's objectives in promoting innovation are unchanged; in fact, these objectives are codified: "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157.

which, as the Commission recognizes,[13] are, by definition, financially disadvantaged. Competitive bidding awards the well-heeled company or investor, not the source of innovative thought and application. Even if an entrepreneur were able to attract the necessary capital to mount a successful bid, he still is forced to relinquish a greater part of his control over his own product than would otherwise be necessary when he must compete for a license, resulting in the dilution of the benefits of innovation.

Accordingly, the Parties note that there is no impediment to continued existence of a pioneer's preference system upon the introduction of a competitive bidding system -- the two systems may co-exist comfortably under existing rules and policies. Inasmuch as grant of a pioneer's preference constitutes a determination that the subject application is not mutually exclusive with any other application, the Commission is statutorily barred from applying any of its auction rules,[14] including an assessment of a charge for award of the license.

These concerns are particularly evident when the pioneering efforts of the Appellant Parties are considered. The public record demonstrates that each of the parties responded to the Commission's

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[13]/ NPRM at ¶ 8.

[14]/ A precondition to subjecting an application to competitive bidding is the existence of mutual exclusivity. Congress grants authority to grant licenses through competitive bidding only "[i]f mutually exclusive applications are accepted for filing . . . ." 47 U.S.C. § 309(j)(1).

well articulated policy to encourage the deployment of new technologies and services in rural areas of the nation by obtaining experimental authorization to provide personal communications services. Each party additionally sought a pioneer's preference as reward for its innovative efforts in deploying new technologies and services in rural America.

The Congressional mandate to select licensees on the basis of competitive bidding hardly constitutes a basis for repeal of the Commission's pioneer's preference rules when consideration is given to the entire direction established by Congress. The Commission's consideration in this proceeding, however, does provide an opportunity for the Commission to ensure that its rules are applied in an equitable manner and consistent with Congressional action.

Section 309(j)(3) of the Communications Act requires the Commission to determine whether competitive bidding promotes specific public policy objectives including 1) the rapid development of new technologies and services to the members of the public, including those residing in rural America; and 2) the dissemination of licenses among a wide variety of applicants including small businesses, rural telephone companies, and businesses owned by members of minority groups and women (the "designated entities").

Maintaining and properly applying the pioneer's preference

rules will foster obtainment of these objectives. By granting a request for a pioneer's preference to a member of a designated entity group in response to the applicant's effort to deploy new services and technologies in rural America, the Commission would take action in furtherance of the cited objectives in a manner consistent with the Congressional mandate to implement a competitive bidding process in the context of each of the public policy goals it is required to consider. The application of the pioneer would properly not be considered mutually exclusive with any other application, and consequently would not be subject to competitive bidding.

The commitment of each of the Appellant Parties to bring new technologies and services to rural America is illustrative. Each party is a small business affiliated with a rural telephone company; each party's effort in obtaining experimental authorization to provide new services in rural areas is reflective of its pioneering commitment, consistent with the Congressional objectives codified in Section 309(j)(3) of the Communications Act. The Commission's decision to review its application of its pioneer's preference rules in the context of the recent action by Congress offers an opportunity for the Commission to reverse the unlawful dismissal of the Parties' pioneer's preference requests, and to grant each Party's request consistent with the public interest embodied in the Commission's pioneer's preference rules and further reflected by Section 309(j)(3) of the Act.

III. CONCLUSION

The Appellant Parties oppose any modification of existing pioneer's preference rules and submit that the public interest will be served only by their continuation and lawful implementation. The value of promoting innovation must not be sacrificed to lesser concerns.

Respectfully submitted,

Adams Telcom, Inc., Advanced Tel., Inc., Columbia Wireless Limited Partnership, East Ascension Telephone Company, Inc., Middle Georgia Personal Communications, Paramount Wireless Limited Partnership, Reserve Telephone Company, Inc., Reserve Telecommunications and Computer Corp., and Tri-Star Communications, Inc.

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November 15, 1993

CERTIFICATE OF SERVICE

I, Nicola A. Chenosky, of Kraskin & Associates, 2120 L Street, N.W., Suite 810, Washington, D.C. 20037, hereby certify that on the 15th day of November 1993, I mailed by first class postage prepaid, a copy of the attached Comments of the Appellant Parties to the parties listed below:

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